No. 14364

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ADRIAN GUERRERO,

Appellant,

vs.

AMERICAN-HAWAIIAN STEAMSHIP CO.,

Appellee.

BRIEF FOR APPELLEE

LASHER B. GALLAGHER,
1256 West First Street,
Los Angeles 26, California,
Attorney for Appellee.

Parker & Son, Inc. Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF FOR APPELLEE

Jurisdictional Statement.

The Jones Act, upon which the first cause of action is predicated, provides in part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (41 Stat. at Large 988, 1007; Title 46, U. S. Code, Sec. 688.)

The second cause of action is predicated upon the averment that the "plaintiff has been and will be required to spend large sums of money for his maintenance and cure."

Article III, Sections 1 and 2, Constitution of the United States, conclusively establishes the proposition that the two causes of action were within the jurisdiction of the United States District Court for the reason that said court is an inferior court which the Congress has ordained and established and the Constitution provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

The notice of appeal to this Honorable Court was filed within thirty days from the entry of the judgment. Therefore, pursuant to Rule 73, Rules of Civil Procedure, this Honorable Court is vested with jurisdiction.

Statement of the Case.

The answer of the defendant avers a separate and special defense as follows:

> "That on the 26th day of August, 1949, the plaintiff in consideration of the sum of $1812.00 duly made and executed a general release whereby he released the defendant from any and all liability for any and all claims the plaintiff might have had against the defendant including the injury for which he sues herein and the plaintiff has no proper claim therefor." [Tr. p. 7.]

On February 23, 1954, the defendant served and filed a notice of motion and a written motion for summary judgment.

The grounds of the motion are stated therein as follows:

> "That there is no genuine issue as to any material fact and that as a matter of law the defendant is entitled to judgment as a matter of law." [Tr. p. 22.]

The written motion for summary judgment also provides as follows:

> "Said motion is based upon this notice of motion and motion for summary judgment, the records and files in this action, the testimony and evidence given at the trial in said action, and upon the memorandum of points and authorities attached hereto and served and filed herewith." [Tr. p. 22.]

Also served and filed at the same time was a memorandum of points and authorities as follows:

> "There is no question but that the standard relative to releases executed by seamen is that set up by the Supreme Court in *Garrett v. Moore-McCormack Co.,* 317 U. S. 239, 248, 87 L. Ed. 239, 245:
>
> " 'We hold, therefore, that the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding.'
>
> "When the shipowner has once shown that the seaman executed his release with a full understanding of his rights, however, then the release will be sustained. As the Court said in *Bonici v. Standard Oil Co.,* 103 F. 2d 437:

" 'Hence, while "one who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman" (Harmon v. United States, 59 F. (2d) 372 at page 373) *nevertheless a release fairly entered into and fairly safe-guarding the rights of the seaman should be sustained. Any other result would be no kindness to the seaman, for it would make all settlements dangerous from the employer's standpoint and thus tend to force the seaman more regularly into the courts of admiralty. . . . Fair settlements are in the interest of the men, as well as of the employers.*' (Emphasis added.)

"Fully in accord with this principle is the decision in *Johnson v. Andrus,* 119 F. 2d 287, at 288, where the Court stated: 'We need not consider the original validity of Johnson's claims, because we agree with Judge Hincks that whatever they were, he released them with full knowledge of what he was doing, and for an adequate consideration, satisfactory to himself . . . Scrutinize this transaction as one will, if the finding is accepted, there was not a shadow of overreaching in its procurement; *to set it aside would in effect deny to seamen the freedom to settle their controversies upon their own terms . . .*' (Emphasis added.) In the case of *Pfeil v. United States,* 34 F. 2d 923 at 924, the Court in deciding the validity of a seaman's release for salvage said: '. . . the authorities do not go to the extent of holding that seamen are incompetent to make a binding settlement, or that releases must be upset without any evidence of deception, duress, or misunderstanding, if the court thinks more might have been obtained by litigation.'

"A Jones Act case involving a release was *Wilson v. McCormick S. S. Co.,* 38 Cal. App. (2d) 726 where the court in reversing a lower verdict for a seaman and upholding the validity of the seaman's release stated, at page 735:

" 'Plaintiff's behavior and condition prior to and at the time the release was executed point unerringly to the conclusion that his physical and mental state was such that he formed in his own mind a determination to compromise his claim; that he fixed an amount for which he would settle; that he made the approach to appellant's representatives, that he negotiated with them, in which negotiations he asked for $1500 and finally compromised for $1,000 plus $250 he had theretofore received; that he signed the release and accepted the money which passed in the transaction . . . Therefore, considering the release here in question from the standpoint of the fairness of the conditions under which it was secured and of the settlement which it constituted, we find nothing unconscionable therein. The consideration which passed to the injured seaman under the terms of the settlement was not negligible or inadequate, considering the injuries sustained by him, when we remember that within a few months after the execution of the release plaintiff represented himself as an able-bodied seaman . . .'

"In the case of *Stetson v. United States,* 63 F. Supp. 24 (So. Dist. Calif.), the seaman had some $462.00 in wages due him. He had suffered some injuries and settled all of his claims, signing a release, for a total of $745.00. Judge Yankwich found that the seaman had read and understood the release and that it was executed freely, without deception or coercion and with a full understanding of his rights. Mr. Fall took an appeal from the adverse

decision but the Court of Appeals (155 F. 2d 359) affirmed the lower decree. Please see also:

Sitchon v. American Export Lines, 113 F. 2d 830;

Bandy v. Keystone Shipping Co., 100 F. Supp. 985.

"A case, the facts of which fit precisely into the case at bar, is *Harmon v. United States,* 59 F. 2d 372, where the United States Court of Appeals, in upholding a decision that the seaman's release was valid, states as follows:

" 'While the record would easily support a finding that in releasing his claim appellant did not act wisely, it does not at all appear therefrom that he was either mentally or physically incapacitated from fully understanding and appreciating what he deliberately did. On the contrary, a careful reading of the record permits no other view than that appellant thoroughly understood the contents of the instrument which he signed, was well advised of all the facts and circumstances, including the state of the medical opinion as to his case, and well knew the consequences of its signing. Here is no case of a seaman *in extremis* pressed into a half understood agreement, which takes away an undoubted right. *Here is a case of a matter in controversy, negotiations in regard to which, protracted over a considerable space of time in an atmosphere not of overreaching and double dealing, but of frankness and plain dealing, finally resulted in a settlement with nothing really set up to defeat it except the claim which of course may not avail, that one side obtained a better bargain than the other.*' (Emphasis added.)

"Therefore, if the release executed by Mr. Guerrero was executed by him freely, without deception or coercion, such release is a complete defense to this

action as a matter of law and there is no question of fact to go to the jury and defendant must prevail.

"The evidence given at the trial shows without dispute that:

"1. Plaintiff consulted Attorney Richard Gladstein in San Francisco concerning his claim.

"2. Plaintiff consulted Attorney David Marcus in Los Angeles concerning his claim.

"3. Plaintiff consulted the President of the Marine Fireman's Union, of which plaintiff was a member, with reference to his claim and the president told him how much he should ask for to settle the claim.

"4. Plaintiff consulted with Gus Oldenburg, the business agent for the same union, on various occasions concerning the claim and was in constant contact with the union and being guided by the advice of union representatives during the protracted negotiations leading up to the execution of the release.

"5. Plaintiff began his negotiations with a figure of $7500.00 which he stated he would reduce to $5000.00 if it were paid directly to him instead of through his attorney.

"6. The negotiations went on to a point where plaintiff on one occasion refused to accept $1500 plus the $312 maintenance previously paid but later returned and accepted it.

"7. There were two versions of the circumstances surrounding the items placed on the reverse side of the company's memorandum (Defendant's Exhibit at the trial), either of which substantiates the fact that plaintiff was well aware of his rights before he executed the release:

"A. Guerrero's testimony was that Mr. Oldenburg, the union business agent, had put all of the items and figures down on the memorandum and had

given the paper to Guerrero to take back to the American-Hawaiian Steamship Company's office to continue with the negotiations.

"B. The testimony of Mr. Holbrook, American-Hawaiian Steamship Company's agent, was that he had placed on this memorandum the items and amounts covering wages until the end of the voyage, lost personal effects, loss of glasses, maintenance and cure, etc. and handed the paper to Guerrero to take to his union; and that when Guerrero had returned the new items for loss of wages and 'disfiguration' had been placed on the paper.

"It is suggested that Mr. Holbrook's testimony is worthy of more weight since the face of the paper was a company office form, but in either event, there is proof positive that Guerrero knew all of his rights set out in the paper before he signed the release.

"8. Plaintiff telephoned to the San Francisco office of the American-Hawaiian Steamship Company, expressed a lack of confidence in his attorney and informed the witness Slevin that he, Guerrero, was consulting his own doctor.

"9. Plaintiff was declared 'fit for duty' by the United States Public Health Service on August 18, *194.* (1949). The release was executed by him on August 26, 1949.

"Conclusion

"In view of the above uncontroverted facts given in sworn testimony at the trial or set out in exhibits introduced into evidence, there can be no question but that the release is valid as a matter of law; that there is no question of fact to go to the jury; and that defendant, American-Hawaiian Steamship Company, a corporation, should have a summary judgment in its favor." [Tr. p. 22, line 25, to p. 29, line 11.]

At the same time there were also served and filed "Proposed Findings of Fact and Conclusions of Law" and a "Proposed Judgment" as follow:

"FINDINGS OF FACT.

"That on August 26, 1949, after having read the same, the plaintiff in Los Angeles County, State of California, made and executed the following contract of release:

" 'RECEIPT AND RELEASE.

" 'KNOW ALL MEN BY THESE PRESENTS: That the undersigned, Adrian Guerrero, in consideration of the payment to him of the sum of eighteen hundred and twelve Dollars ($1,812.00) lawful money of the United States of America, the receipt whereof is hereby acknowledged, does hereby release and forever discharge American-Hawaiian Steamship Company, a corporation, the Steamship Belgium Victory, its Master, officers, agents, crew and each of them, the War Shipping Administration, United States of America, and Fireman's Fund Insurance Company, from any and all claims and demands of every nature whatsoever by the undersigned from the beginning of the world to and including the present time, and without limiting this release to any specific claim or claims, whether mentioned herein or not, the undersigned does hereby release said vessel and said parties and each of them from all claims arising out of or in connection with that certain injury and/or illness suffered by the undersigned while employed by said vessel on or about May 16, 1949, including without limitation however all claims for damages at law and in admiralty, including interest and costs, and for wages, maintenance, cure, transportation, and subsistence, under any act or law, it being the intention of this instrument to acknowledge full and

complete settlement and satisfaction for any loss, damage, injury, sickness or expense, suffered or sustained or claimed by the undersigned, as aforesaid, whether the same be now existent or known to him, or which may hereafter arise, develop or be discovered.

" 'Dated at Los Angeles this 26 day of August, 1949.

" 'THIS IS A GENERAL RELEASE.

" '*I have read and understand the above.*

" '/s/ R. F. Holbrook /s/ Adrian Guerrero.'

"II.

"That neither the plaintiff nor defendant was a minor or a person deprived of civil rights at the time the said release was executed; that each of said parties consented to the said contract of release; that there was a lawful object to such contract, that is, the settlement of plaintiff's claim against defendant; and that there was a sufficient consideration given to each of the parties for their respective consents thereto.

"III.

"Plaintiff was sent to Attorney Gladstein in San Francisco, California, by his union officials in July, 1949, relative to his injury, and plaintiff also shortly thereafter consulted Attorney Marcus in Los Angeles, California.

"IV.

"Plaintiff began negotiations for the settlement of his claim with a representative of the American-Hawaiian Steamship Company, a corporation, in

Long Beach or Wilmington, California. Plaintiff entered into negotiations with said representative and said representative started with an offer of $100.00 or $200.00 to settle plaintiff's claim. Plaintiff on his part offered to settle his claim for $7500.00 which plaintiff stated he would reduce to $5000.00 if it were paid directly to him instead of through his attorney. During the negotiations plaintiff saw Mr. Gus Oldenburg, the business agent of the union, more than once in connection with his claim and plaintiff also talked to the President of the Marine Fireman, Oilers, Watertenders and Wipers Union about his case and the money he should receive and said President told plaintiff what he should receive. During negotiations with the representative of the American-Hawaiian Steamship Company, a corporation, in Wilmington, California, in July and August, 1949, which negotiations went on for some three weeks, plaintiff was in constant contact with his union and was being guided by the advice of the union and during a part of which time plaintiff would sit and talk to the union man while the latter would talk on the telephone to someone at the company.

"V.

"The negotiations for settlement between plaintiff and defendant continued until plaintiff on one occasion refused to accept from said American-Hawaiian Steamship Company representative, R. F. Holbrook, an offer on behalf of defendant of $1500 in addition to the $312 maintenance money previously paid, but later he returned to the office of R. F. Holbrook in Wilmington, California, where he accepted the offer and executed the release and receipt.

"VI.

"That prior to executing said release and accepting the consideration therefor, plaintiff read the items and amounts set forth in Defendant's Exhibit C, to wit:

" 'Maintenance prev. paid	300.00
Maintenance due	12.00
Unearned wages	272.43
Transportation to N. O.	92.50
Bonus while workaway	25.00
Loss personal effects	47.25
Fare to S. F. and return	25.00
New Glass & Exam	70.00
	844.18
Less Tax, Etc.	38.72
Less agents advance	40.00
	765.46
Less Maintenance prev. paid	300.00
	$465.46 net

" 'Loss of wages to date—870

" 'For injuries and disfiguration—7500'

That with references to said Exhibit C, either the figures and descriptions thereon were written by said Gus Oldenburg who gave the paper to plaintiff and plaintiff read the portions of said Exhibit prepared by said Gus Oldenburg at said time and told plaintiff to give it to the company and plaintiff gave the paper to the company, or certain of the figures and descriptions, to wit:

" 'Maintenance prev. paid	300.00
Maintenance due	12.00
Unearned wages	272.43
Transportation to N. O.	92.50
Bonus while workaway	25.00
Loss personal effects	47.25
Fare to S. F. & return	25.00
New Glass & Exam	70.00
	844.18
Less Tax, Etc.	38.72
Less agents advance	40.00
	765.46
Less Maintenance prev. paid	300.00
	$465.46 net'

were written thereon by Mr. Holbrook in the presence of the plaintiff, the paper was handed to the plaintiff, and was then brought back by plaintiff to Mr. Holbrook's office and given to Mr. Holbrook with the additional items, to wit:

" 'Loss of wages to date—870

" 'For injuries and disfiguration—7500' having been placed thereon in the interim.

"VII

"With reference to Exhibit D, the receipt and release, plaintiff, immediately prior to the time he received the sum of $1500.00, placed upon said release in his own handwriting the following words and signature: 'I have read and understand the above. Adrian Guerrero.' At the time plaintiff executed said release and received the said sum

of $1500.00 he understood that he was giving up all of his claim against American-Hawaiian Steamship Company, a corporation, and said plaintiff had been a seaman for several years and knew at the time he signed said release that he was entitled to maintenance and cure for all time he was unable to work, and he also knew at said time that he was entitled to transportation back to his home or port and that defendant was obligated to pay for his return transportation; and plaintiff also knew at said time that he was entitled to his unearned wages until the end of the voyage.

"VIII.

"At the time the plaintiff executed the said release, plaintiff had had a ninth or tenth grade education.

"IX.

"Prior to executing the said release plaintiff telephoned to the San Francisco office of defendant corporation and talked to E. M. Slevin, Insurance and Claims agent for Williams, Dimond and Co., Pacific Coast Agent of American-Hawaiian Steamship Company, a corporation, and at that time informed Mr. Slevin that he, the plaintiff, lacked confidence in the attorney he then had, and further, that he was going to consult his own doctor.

"X.

"That after having been treated by the United States Public Health Service for injuries alleged to be the basis of the action at bar, plaintiff was declared fit for duty by said United States Public Health Service on August 18, 1949.

"XI.

"That plaintiff executed the said release on August 26, 1949, at Wilmington, Los Angeles County, Cali-

fornia; that he did so voluntarily; that he read and understood the contents thereof at the time he executed it; and that at no time was there any concealment, deception, misrepresentation of any fact, fraud or coercion exercised by the defendant, or by any person acting for defendant or on its behalf. That neither the defendant, nor anyone acting for it or on its behalf, at any time:

"1. Mislead the plaintiff.

"2. Suggest to plaintiff as a fact that which was not true.

"3. Assert positively to plaintiff that which was not true.

"4. Suppress from plaintiff any truthful fact.

"5. Promise plaintiff anything without having the intention to perform the promise.

"6. Do any act fitted to deceive the plaintiff.

"XII.

"That plaintiff at no time rescinded the contract of release and at no time has plaintiff restored or offered to restore to the defendant all or any part of the consideration received by plaintiff under the contract of release.

"XIII.

"At all times since the creation of the relationship of attorney and client between the plaintiff and David A. Fall, Esq., and for many years prior thereto, the said David A. Fall, has been and he now is a member of the bar of this Court and pursuant thereto authorized to practice as a proctor in admiralty and in all cases of admiralty and maritime jurisdiction and the said David A. Fall was at all times from and including the date of his employment by the plaintiff in the above entitled action thoroughly

familiar with all of the rules pertaining to the rights of a seaman under the general maritime law and pursuant to the Jones Act; and the said David A. Fall fully performed all of his duties and obligations to the plaintiff in the above entitled matter, arising out of and connected with the said relationship of attorney and client, at all times while said relationship of attorney and client has existed; and at all times herein mentioned, and from October 27, 1952, the date of plaintiff's deposition, up to and including the commencement of the trial herein and all during the trial, the said David A. Fall was aware of the fact that the plaintiff at no time rescinded or offered to rescind the release marked herein as Defendant's Exhibit D and that the said plaintiff at no time from the execution of said release up to and including the termination of the trial restored or offered to restore to the defendant the sum of $1500 or any other sum whatsoever or at all. That during the trial of this action it was pointed out to said David A. Fall in the presence of the Court by defendant's counsel that there had been no restoration or offer to restore said consideration, or any part thereof; and plaintiff has retained and still retains said consideration and all thereof.

"XIV.

"That plaintiff ratified the said contract of release by retaining the consideration received by him therefor and by not rescinding or offering to rescind said contract of release after he had available to him the professional advice of the said David A. Fall.

"XV.

"That there is no genuine issue as to any material fact set forth herein above in these Findings of Fact.

"Conclusions of Law.

"I.

"That the release of August 26, 1949, executed by the plaintiff was valid and that the plaintiff is not entitled to recover any sum whatsoever from the defendant, American-Hawaiian Steamship Company, a corporation.

"II.

"Plaintiff has by his failure to rescind or to restore or offer to restore to the defendant any part or portion of the cash consideration of $1500.00 paid to and accepted by him ratified the said release and is not entitled to attack the validity thereof in this action.

"III.

"The defendant, American-Hawaiian Steamship Company, a corporation, is entitled to judgment against the plaintiff for its costs incurred herein.

"Dated: February ....., 1954.

"United States District Judge

Approved as to form.....

Attorney for Plaintiff.

Affidavit of Mailing—Endorsed:

"Filed Feb. 23, 1954,

"Edmund L. Smith, Clerk.

"Title of District Court and Cause.

"Proposed Judgment.

"The above entitled action having come on regularly for hearing before the Honorable Harry C. Westover on motion of Defendant, American-Hawaiian Steamship Company, a corporation, for a summary judgment; Plaintiff appearing by his at-

torney, David A. Fall, Esq., and the Defendant appearing by its attorneys, Lasher B. Gallagher and Robert Sikes, by Robert Sikes, Esq., and the matter having been fully argued by counsel for the respective parties and the Court being fully advised in the law and the facts and having granted said motion; and the Court having made and filed herein its written Findings of Fact and Conclusions of Law;

"NOW, THEREFORE, IT IS HEREBY ADJUDGED AND DECREED that the Plaintiff take nothing by his action and that the Defendant, American-Hawaiian Steamship Company, a corporation, recover from the plaintiff its costs incurred herein and taxed in the sum of.....

"Dated: ....., 1954.

"UNITED STATES DISTRICT JUDGE

Approved as to form.....

Attorney for Plaintiff.

Affidavit of Mailing—Endorsed:

"Filed Feb. 23, 1954,

"EDMUND L. SMITH, Clerk"

[Tr. p. 30, line 2, to p. 40, line 25.]

The transcript shows that the proceedings at the trial which resulted in a disagreement of the jury and the declaration of a mistrial occurred on January 19 and January 21, 1954 and that the proceedings were reported by S. J. Trainor. [Tr. pp. 18-20.]

The record also shows that the proceedings on the motion for summary judgment were also reported by S. J. Trainor. [Tr. p. 42.]

On March 8, 1954 at the time of the hearing of the motion for summary judgment, the record shows as follows:

> "Statements are made respectively by the court, Attorney Sikes, and Attorney Fall."

The "Findings of Fact and Conclusions of Law" and the "Judgment" based thereon were docketed and entered on March 26, 1954, the same date upon which they were signed by the Trial Judge. These Findings of Fact and Conclusions of Law and Judgment are in the same form as set forth in the proposed Findings of Fact and Conclusions of Law and proposed Judgment.

In the appellant's designation of the portions of the record to be contained in the record on appeal, he failed to designate for inclusion any of "the testimony and evidence given at the trial in said action" specified in the written notice of motion as one of the bases of the motion or any part of the oral proceedings at the time the matter was presented to the trial judge on March 8, 1954. [Tr. p. 63.]

The only point which is involved in this appeal is whether there was a genuine issue as to any material fact concerning the validity of the release.

ARGUMENT.

POINT I.

The Fact That a Formal Issue as to the Validity of the Release Was Raised by Operation of Law Did Not Entitle the Appellant, Ipso Facto, to a Trial by Jury With Reference to That Proposition.

The Federal Rules of Civil Procedure provide, in part, as follows:

> "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." (Rule 7(d).)

This rule does not mean that the trial judge may not properly grant a motion for a summary judgment pursuant to the provisions of Rule 56.

This Honorable Court has stated the rule contended for by the appellee, in this respect, as follows:

> "The purpose of the procedural rule 56, Federal Rules of Civil Procedure, 28 U. S. C. A., providing for the rendering of summary judgment is to dispose of cases where there is no genuine issue of fact even though an issue may be raised formally by the pleadings."
>
> *Koepke v. Fontecchio,* 177 F. 2d 125, 127.

POINT II.

Appellant's Contention That Section 55 of Title 45, U. S. Code, Is Applicable to a Release and Settlement Is Invalid.

At the bottom of page 25 and the top of page 26 of the brief for appellant he quotes Title 45, U. S. Code, Section 55, which provides, in part, as follows:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: . . ."

He then states as follows:

> "The cases construing Sec. 55 of 45 U. S. C. A. are consistent in holding that a written release by an injured worker of his rights, even with consideration, does not bar a subsequent suit, . . ." (Br. for App. p. 26, lines 13-16.)

Appellant has misconceived the effect of the statute referred to.

> "The plaintiff has also contended that this release violates §5 of the Federal Employers' Liability Act which provides that any contract to enable any common carrier to 'exempt itself from any liability created by this chapter shall to that extent be void.' 35 Stat. 66, c. 149, 45 U. S. C. A., §55, 10A F. C. A. title 45, §55. It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claim without litigation."
>
> *Callen v. Pennsylvania R. Co.,* 332 U. S. 625, 630-631, 92 L. Ed. 242, 246.

POINT III.

The Appellant Has Failed to Comply With the Rules of the United States District Court, Southern District of California.

Rule 83, Federal Rules of Civil Procedure, provides as follows:

> "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

Pursuant to this authority the judges of the United States District Court for the Southern District of California have promulgated certain rules. Among these rules, in effect at the time of the proceedings on the motion for summary judgment in the case at bar, there is a specific rule with reference to motions for summary judgment. It reads as follows:

> "There shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure proposed findings of fact and conclusions of law and proposed summary judgment. Such proposed findings shall state the material facts as to which the moving party contends there is no genuine issue.
>
> "Any party opposing the motion may, not later than three days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

> "In determining any motion for summary judgment, the court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion." (Local Rules, So. Dist., Calif., 3(d)(2).)

The transcript demonstrates that the appellee served and filed with its motion for summary judgment "Proposed Findings of Fact and Conclusions of Law" and "Proposed Summary Judgment."

The appellant did not serve or file any "Statement of Genuine Issues." In fact, the transcript demonstrates that the plaintiff did not serve or file any document from the time appellant's motion for summary judgment and the proposed findings of fact, conclusions of law and proposed summary judgment were served and filed until after the motion had been granted.

Appellant's proposed findings stated, among others, the following material facts as to which it contended there was no genuine issue:

1. That on August 26, 1949, *after having read the same,* the plaintiff made and executed the receipt and release set forth verbatim in Paragraph I of the proposed findings of fact.
2. That each of the parties consented to the said contract of release.
3. That there was a lawful object to said contract, that is, the settlement of plaintiff's claim against defendant.

4. That there was a sufficient consideration given to each of the parties for their respective consents thereto.

5. That the plaintiff was sent to Attorney Gladstein in San Francisco, California, by his union officials, in July, 1949, relative to his injury, and also shortly thereafter consulted Attorney Marcus in Los Angeles, California.

6. That during the negotiations in July and August, 1949, leading up to the settlement, plaintiff was in constant contact with his union and was being guided by the advice of the union.

7. That immediately prior to the time the plaintiff received the sum of $1500 he placed upon the release in his own handwriting the following words and signature: "I have read and understand the above. Adrian Guerrero."

8. At the time plaintiff executed said release and received the said sum of $1500 he understood that he was giving up all of his claims against American-Hawaiian Steamship Company, a corporation, and that plaintiff knew at the time he signed said release that he was entitled to maintenance and cure for all time that he was unable to work, and that he was entitled to transportation back to his home or port and that defendant was obligated to pay for his return transportation and that he was entitled to his unearned wages until the end of the voyage.

9. That at the time the plaintiff executed the said release he had had a 9th or 10th grade education.

10. That prior to executing the said release he had been declared fit for duty by the United States Public Health Service on August 18, 1949.

11. That the plaintiff executed said release on August 26, 1949, at Wilmington, Los Angeles County, California, voluntarily.

12. That plaintiff read and understood the contents of the release at the time he signed it.

13. That at no time was there any concealment, deception, misrepresentation of any fact, fraud or coercion exercised by the defendant, or by any person acting for defendant or on its behalf.

14. That neither the defendant, nor anyone acting for it or on its behalf at any time:

    1. Mislead the plaintiff.
    2. Suggest to plaintiff as a fact that which was not true.
    3. Assert positively to plaintiff that which was not true.
    4. Suppress from plaintiff any truthful fact.
    5. Promise plaintiff anything without having the intention to perform the promise.
    6. Do any act fitted to deceive the plaintiff.

15. That plaintiff at no time rescinded the contract of release and at no time has plaintiff restored or offered to restore to the defendant all or any part of the consideration received by plaintiff under the contract of release.

16. That plaintiff ratified the said contract of release by retaining the consideration received by him therefor and by not rescinding or offering to re-

scind said contract of release after he had available to him the professional advice of said David A. Fall.

17. That there is no genuine issue to any material fact set forth hereinabove in these findings of fact.

Pursuant to the plain provisions of the Local Rules hereinabove set forth the trial judge was entitled to assume that the facts as claimed by the appellant in its proposed findings of fact were admitted to exist without controversy.

In the leading case of *Garrett v. Moore-McCormack Company,* 317 U. S. 239, 87 L. Ed. 239, the court states the rule with reference to a release executed by a seaman as follows:

> "We hold, therefore, that the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights."
>
> *Garrett v. Moore-McCormack Company,* 317 U. S. 239, 248, 87 L. Ed. 239, 245.

The findings of fact show that there was no genuine issue with reference to the following facts: That the release was executed freely, without deception or coercion, and it was made by the appellant with full understanding of his rights, and that there was a sufficient consideration therefor.

The first part of Rule 3(d), Local Rules, Southern District of California, is also pertinent. The rule reads, in part, as follows:

> "There shall be served and filed with the notice of motion . . . a brief, but complete, written statement of all reasons in support thereof, together with a memorandum of the points and authorities upon which the moving party will rely. Each party opposing the motion or other application shall (A), within five days after service of the notice thereof upon him, serve and file a brief, but complete, written statement of all reasons in opposition thereto and an answering memorandum of points and authorities, or a written statement that he will not oppose said motion, . . .
>
> * * * * * * * *
>
> "Failure by the moving party to file any instruments or memorandum of points and authorities provided to be filed under this rule, shall be deemed a waiver by the moving party of the pleading or motion. In the event an adverse party fails to file the instruments and memorandum of points and authorities provided to be filed under this rule, *such failure shall be deemed to constitute a consent to* the sustaining of said pleading or *the granting of said motion* or other application." (Emphasis added.) (Local Rule, So. Dist. Calif. 3(d).)

There is nothing in the transcript of the record showing that the appellant served or filed any written statement of reasons in opposition to the motion for summary judgment or any answering memorandum of points and authorities in opposition to the motion for summary judgment.

POINT IV.

The Appellant Ratified the Contract of Release by Retaining the Consideration and Failing to Return or Offer to Return Any Part or Portion of the Consideration.

In the proposed findings of fact, served and filed with the notice of and motion for a summary judgment, the following is set forth:

> "That plaintiff ratified the said contract of release by retaining the consideration received by him therefor and by not rescinding or offering to rescind said contract of release after he had available to him the professional advice of the said David A. Fall."

The said proposed findings of fact also contained the following:

> ". . . and that at no time was there any concealment, deception, misrepresentation of any fact, fraud or coercion exercised by the defendant, or by any person acting for defendant or on its behalf. That neither the defendant, nor anyone acting for it or on its behalf, at any time:
>
> "1. Mislead the plaintiff.
>
> "2. Suggest to plaintiff as a fact that which was not true.
>
> "3. Assert positively to plaintiff that which was not true.
>
> "4. Suppress from plaintiff any truthful fact.
>
> "5. Promise plaintiff anything without having the intention to perform the promise.
>
> "6. Do any act fitted to deceive the plaintiff."

By his failure to serve and file a "Statement of Genuine Issues" setting forth any material fact with reference to the above matters as to which it was contended by

him that there existed a genuine issue necessary to be litigated, the appellant authorized the trial judge to assume that the facts as claimed by the appellee were admitted to exist without controversy.

> "When one has been induced by fraud to enter into a contract, he must ordinarily on discovery of the fraud promptly elect whether he will affirm or disaffirm the contract, and if the latter return what he received if of any value. Otherwise he will at law and in equity be held to have ratified and confirmed it. Here there was, according to Franco, no fraud in inducing him to agree to settle for his *time* for $300. He does not disaffirm, but stands by that agreement. He says there was a *fraud* in *creating* the *written memorial* of *that contract,* in inducing him to execute a paper whose *contents* were *misrepresented* to him. He can annul this paper for *that* reason without abandoning the *real* contract, and without returning the $300 *if it was really paid to settle his lost time* as he says, and not for his signature to the paper, or for a general settlement. This was a question of fact." (Emphasis added.)
>
> *Panama Agencies Co. v. Franco,* 111 F. 2d 263, 266.

The foregoing excerpt is from a case of admiralty and maritime jurisdiction. It is applicable to the question of law involved in this subdivision of the brief.

The appellant filed no "Statement of Genuine Issues" setting forth any contention that he did not fully understand the release or that the money was paid to him for something other than the consideration set forth in the written contract.

The trial judge had found that before appellant signed the release he read it, that he signed it voluntarily; and that he understood the contents thereof at the time he executed it.

The trial judge also found appellant was sent to Attorney Gladstein in San Francisco, California, by his union officials in July, 1949, relative to his injury and also shortly thereafter consulted Attorney Marcus in Los Angeles, California. In addition to this it appears without conflict that the appellant was in constant contact with the officials of his union with reference to the contemplated settlement.

By failing to file any statement of genuine issue with reference to the sufficiency of the consideration set forth as one of the material facts in the proposed findings of fact, pursuant to Local Rule 3, *supra,* the appellant admitted that there was a sufficient consideration for the release of all of his claims against the appellee.

Under the foregoing circumstances it is clear that the appellant elected to stand upon the contract. He cannot stand upon it and repudiate it at the same time.

Conclusion.

The appellant has cited no authority which entitles him, under the circumstances shown in the transcript of record, to a reversal of the judgment from which the appeal has been taken. It is respectfully contended that the judgment should be affirmed.

Respectfully submitted,

LASHER B. GALLAGHER,

Attorney for Appellee.